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Inc. and USF&G, Defendants

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

UNITED STATES OF AMERICA for the use of  
NORTH STAR TERMINAL & STEVEDORE  
COMPANY, d/b/a NORTHERN STEVEDORING  
& HANDLING, and NORTH STAR TERMINAL &  
STEVEDORING COMPANY, d/b/a Northern  
Stevedoring & Handling, on its own behalf,

Plaintiff,

and

UNITED STATE OF AMERICA for the use of  
SHORESIDE PETROLEUM INC., d/b/a Marathon  
Fuel Service, and SHORESIDE PETROLEUM  
INC., d/b/a Marathon Fuel Service, on its own  
behalf,

Intervening Plaintiffs,

and

METCO, INC.,

Intervening Plaintiff,

vs.

NUGGET CONSTRUCTION INC.; SPENCER  
ROCK PRODUCTS INC.; UNITED STATES  
FIDELITY AND GUARANTY COMPANY; and  
ROBERT A. LAPORE,

Defendants.

No. 3:98-cv-00009-TMB

NUGGET'S MOTION IN  
LIMINE RESPECTING  
LETTER FROM CORPS OF  
ENGINEERS  
ADMINISTRATIVE  
CONTRACTING OFFICER  
THOMAS A. JOHNSON, P.E.  
AND RELATED TESTIMONY

1 I. **INTRODUCTION**

2 Nugget Construction Company ("Nugget") moves the court for an order *in limine*  
3 excluding from evidence at trial the letter from Thomas A. Johnson, P.E., Administrative  
4 Contracting Officer with the U.S. Army Corps of Engineers, to Nugget titled "SUBJECT:  
5 Spencer Quarry, Contract DACW85-96-C-0020, Homer Spit Repair & Extension,  
6 Homer, Alaska" (Exhibit A, attached hereto) and any statements, argument, testimony  
7 or other evidence related to the opinions expressed in the letter.

8 II. **BACKGROUND**

9 This litigation arises from a project in Homer, Alaska, on which Nugget was the  
10 general contractor. North Star Terminal and Stevedoring Company ("North Star") was a  
11 vendor of Nugget's rock supplier, Spencer Rock Products, Inc. ("Spencer"). At this time,  
12 North Star is the only second-tier vendor remaining with claims against Nugget, the  
13 other second-tier vendors, Shoreside Petroleum, Inc. ("Shoreside") and Metco, Inc.  
14 ("Metco") having settled their claims against Nugget and its surety. Nugget seeks a  
15 ruling that North Star may not introduce into evidence Administrative Contracting Officer  
16 Johnson's letter in which he states that "[w]e do not necessarily agree that Spencer  
17 Rock Products is only a "vendor" for Miller Act purposes," and that "it appears that  
18 Nugget Construction has assumed full responsibility for operations at Spencer Quarry  
19 for the subject project. Therefore, as primary operator at Spencer Quarry, we believe  
20 Nugget Construction is responsible for prompt payment to suppliers and subcontractors  
21 who contracted with Spencer Rock Products on this project." Nugget also seeks an  
22 order excluding from trial any statements, argument, testimony or other evidence  
23 regarding the opinion expressed in Mr. Johnson's letter.

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III. ARGUMENTA. The Content of the Johnson Letter Constitutes Improper Lay Opinion Testimony

The statements in Johnson's letter constitute his opinions concerning the relationship between Nugget and Spencer. Most certainly, North Star will seek to introduce the letter and the opinions contained therein in an attempt to prove the truth of the matters asserted. Nugget understands that Mr. Johnson is now deceased, and therefore, not available to personally testify regarding these matters. As such, the statements are inadmissible hearsay.

More importantly, however, Johnson was not qualified to, and cannot, testify as an expert witness in this case; consequently, any opinions expressed in the letter must conform to the requirements of Fed. R. Evid. 701 regarding Opinion Testimony by Lay Witnesses. For lay witnesses, "the witness' testimony in the form of opinions or inferences is limited to those . . . which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

When applying the requirements of Fed. R. Evid. 701 to proffered evidence, the court must determine, as a threshold matter, whether the opinion is rationally based on the witness' own perceptions. A lay witness must establish that his/her opinion is based on personal knowledge. If the witness fails to identify an objective basis for the opinion, the proffered testimony does not meet the requirements of Rule 701, "because there is no way for the court to assess whether it is rationally based on the witness's perceptions." *United States v. Awadallah*, 401 F. Supp.2d 308, 314 (S.D.N.Y. 2005), *citing United States v. Garcia*, 291 F.3d 127, 140 (2nd Cir. 2002).

1 Opinions that are not based on the witness' first-hand, personal knowledge are  
2 inadmissible. *DIJO, Inc. v. Hilton Hotels Corp.*, 351 F.3d 679, 685 (5th Cir. 2003). In  
3 *DIJO*, the court held that the admission of testimony concerning a developer's lost  
4 profits was improper where the witness had no firsthand, personal knowledge of the  
5 developer's operations and his opinion was based on his "generic industry experience."  
6 *Id.* at 686. Similarly, lay opinion testimony cannot be based on the perceptions of  
7 others that the witness has read in reports. *TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33  
8 F.3d 397, 400 (4th Cir. 1994). In *TLT-Babcock*, a case arising from the construction of  
9 a highway tunnel, the court held that the general contractor could not elicit opinion  
10 testimony from the city's project manager on the issue of the cause of a fan shaft failure,  
11 because the project manager's opinions were admittedly based on information he  
12 received in reports from his staff, rather than his own first-hand impressions. *Id.*

13 The Sixth Circuit followed the *DIJO* decision in *JGR, Inc. v. Thomasville Furniture*  
14 *Industries, Inc.*, 370 F.3d 519 (6th Cir. 2004). *JGR* involved a breach of contract suit  
15 between a furniture retailer and manufacturer. The trial court had allowed a lay witness  
16 to give opinion testimony regarding the retailer's lost profits and loss of business value  
17 as a consequence of the manufacturer's breach, despite the fact that the witness had  
18 no first-hand knowledge of the retailer's operations and had not independently verified  
19 any information he had received from the retailer. *Id.* at 526. In holding that the district  
20 court had abused its discretion in admitting the unverified, lay opinion testimony, the  
21 court observed that "[t]he further removed a layman is from a company's day-to-day  
22 operations, the less likely it is that his opinion testimony will be admissible under Rule  
23 701." *Id.* at 525-26.

1 In a case between a metropolitan housing authority and the federal government,  
2 the Court of Federal Claims granted a motion to strike a witness declaration as improper  
3 lay opinion testimony where the witness had admittedly based his conclusions on  
4 preliminary determinations made by members of his staff about whether certain  
5 properties were "comparable". *Cuyahoga Metropolitan Housing Authority v. United*  
6 *States*, 60 Fed.Cl. 481, 482-83 (2004). Citing *DIJO*, 351 F.3d 679, the court held that  
7 the declaration was inadmissible because the witness "allowed others on his staff to  
8 perform calculations that he later relied upon in his declaration. Thus, it appears he did  
9 not have the requisite, first-hand knowledge required by Rule 701." *Id.* at 482.

10 Similarly, in *American Marine Rail NJ, LLC v. City of Bayonne*, 289 F.Supp.2d  
11 569 (D.N.J. 2003), the court held inadmissible a witness's opinion testimony regarding  
12 whether a solid waste transporter was entitled to lost profits for its failure to receive a  
13 waste removal contract, due to unconstitutional conduct of the county and city. The  
14 court held that the witness did "not base his opinion on personal knowledge . . . [h]e can  
15 only offer speculation as to the ultimate conclusions that he presents . . . [b]ecause his  
16 opinions are based on conjecture, they lack a rational basis and personal knowledge of  
17 the procurement process. Even under the more relaxed standards of Rule 701, the  
18 Court finds [the witness'] ultimate conclusions inadmissible." *Id.* at 590.

19 Similarly, Johnson's opinions regarding whether Spencer is correctly classified as  
20 a subcontractor or vendor and whether Nugget had "assumed full responsibility for the  
21 operation of Spencer Quarry" are inadmissible because Johnson had no first-hand  
22 knowledge of the nature of the relationship between Nugget and Spencer on this  
23 project. Johnson admitted in his letter that his opinion was "[b]ased on the supporting  
24 costs ... in Serial Letter 611-21" rather than on any first-hand knowledge. In light of the  
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1 applicable case law, Johnson's admitted reliance on information communicated to him  
2 in correspondence does not constitute an adequate foundation for lay opinion testimony  
3 under Fed. R. Evid. 701.

4 Testimony on this issue is also inadmissible because it states a legal conclusion  
5 as to the status of Spencer's relationship with Nugget for Miller Act purposes. Where  
6 lay witness testimony necessarily encompasses a legal conclusion, the trial court may  
7 properly exclude the testimony as unhelpful to the trier of fact. *United States v. Ness*,  
8 665 F.2d 248, 250 (8th Cir. 1981). Similarly, a lay witness may not testify as to the legal  
9 implications of a person's conduct. *United States v. Espino*, 32 F.3d 253, 257 (7th Cir.  
10 1994); *United States v. Baskes*, 649 F.2d 471, 478 (5th Cir. 1977), *cert. denied*, 434  
11 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977).

12 Johnson's statement that he disagrees that Spencer is a "vendor" to Nugget for  
13 Miller Act purposes states a legal conclusion that is an inappropriate subject for lay  
14 opinion testimony, especially given that the Ninth Circuit Court has ruled to the contrary.  
15 Similarly, his opinion that Nugget had become "primary operator at Spencer Quarry"  
16 and therefore "responsible for prompt payment to suppliers and subcontractors who  
17 contracted with Spencer Rock Products on this project," is inadmissible because it is a  
18 conclusory statement regarding the legal consequences of Nugget's actions. This issue  
19 is one that the Ninth Circuit has already determined requires a determination by a jury  
20 after hearing all of the conflicting evidence. Mr. Johnson's lay opinions regarding this  
21 matter are inappropriate, as he did not possess personal knowledge of the facts  
22 required to support those opinions. As such, Mr. Johnson's letter, and any references  
23 thereto, should be excluded from the trial.

1 Dated: June 14, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2007,  
a true and correct copy of the foregoing was served  
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